UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPMC AND ITS SUBSIDIARY, UPMC PRESBYTERIAN SHADYSIDE, SINGLE EMPLOYER, d/b/a UPMC PRESBYTERIAN HOSPITAL AND d/b/a UPMC SHADYSIDE HOSPITAL	Cases:	06-CA-102465 06-CA-102494 06-CA-102516 06-CA-102518 06-CA-102525 06-CA-102534 06-CA-102540
and		06-CA-102542 06-CA-102544 06-CA-102555 06-CA-102559
SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC		06-CA-104090 06-CA-104104 06-CA-106636 06-CA-107127 06-CA-107431 06-CA-107532 06-CA-107896 06-CA-108547 06-CA-111578 06-CA-115826

RESPONDENT'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE IN OPPOSITION

Consistent with Section 102.24(c) of the Rules and Regulations of the NLRB, Respondent submits this Reply to Counsel for the General Counsel's Response in Opposition to Respondent's Motion for Full-Board Reconsideration (the "Response"). Respondent addresses three arguments raised by Counsel for the General Counsel (the "General Counsel").

First, in its Response, the General Counsel attempts to distract from the merits of Respondent's position by primarily focusing on (a) its belief that Respondent did not identify extraordinary circumstances warranting reconsideration; and (b) a suggestion that Respondent's Motion for Full-Board Reconsideration ("Motion") is a re-tread of arguments put forward in prior

briefing. The General Counsel is wrong on both fronts. While Respondent did not repeatedly use the phrase "extraordinary circumstances"[1] throughout its Motion, it identified (at length) such circumstances and explained why they warranted reconsideration. Moreover, the issues addressed in Respondent's Motion for Reconsideration—such as the Board's unexplained and unfounded expansion of the remedies ordered by the Administrative Law Judge—did not arise until the Board issued its Decision and Order. The corresponding facts, arguments, and legal authority relied on by Respondent could therefore not, as a practical matter, have been previously raised by Respondent or considered by the Board. Put simply, the General Counsel's characterization of Respondent's Motion is inaccurate and fails to demonstrate why the requests set forth therein should be denied.

Second, the General Counsel's arguments urging the Board to deny Respondent's request for reconsideration of certain remedies included in the Decision and Order ring hollow and should be rejected. The General Counsel contends the expanded remedies ordered by the Board are a proper exercise of the Board's "broad discretion" to fashion and impose remedies. While Section 10(c) of the NLRA grants the Board discretion, it is far from limitless. Section 10(c) "at a minimum, encompasses the requirement that a proposed remedy be tailored to the unfair labor practice that it is intended to redress." *J.A. Croson Co.*, 359 NLRB 19, 26 (2012). Moreover, "special remedies" are necessary only if it can be demonstrated that the Board's traditional remedies will not adequately eliminate the effects of unfair labor practices. *See In Re Charlotte Amphitheater Corp.*, 331 NLRB 1274, 1277 (2000) (Brame, dissenting in part). In its Response, the General Counsel parrots the Board's conclusory language that the expanded remedies are

[1] For clarity, Respondent has increased its usage of the term "extraordinary circumstances" in this Reply.

justified by the "significant and pervasive unfair labor practices" Respondent allegedly committed. But, like the Board, the General Counsel fails to articulate how the expanded extraordinary remedies are tailored to redress the actual effects of the alleged violations or why traditional remedies are insufficient.

For example, the General Counsel asserts the extended notice-posting period is "appropriate" because "Respondent employs thousands of employees who work a wide variety of shifts in various locations throughout the operation." According to the General Counsel, additional time is needed to ensure Respondent's employees can review the notice. As an initial matter, the General Counsel's description of Respondent as an "operation" consisting of "various locations" is misleading. Respondent is comprised of two physical Hospitals—Presbyterian Hospital and Shadyside Hospital—which are located miles apart. While Respondent employs thousands of employees, the Union sought to organize a discrete subset that comprised less than half of Respondent's total employee population. And, as noted in Respondent's Motion, only a small number of employees are actually at issue with respect to the alleged unfair labor practices (which relate to conduct purportedly occurring more than five years ago). Moreover, the General Counsel cites no Board precedent to support its assertion that the length of a notice-posting period is dictated by the size and nature of an employer's operations, and, indeed, Respondent knows of no such precedent. Further, the General Counsel fails to explain why the traditional 60-day notice-posting period is too short, especially given the Board's order requiring Respondent to "hold a meeting or meetings during working time, which shall be scheduled to ensure the widest possible attendance" and to read the notice "by shifts, departments, or otherwise."

In a footnote, the General Counsel also cites as a basis for the extended notice-posting period Respondent's alleged commission of unfair labor practices while a previous notice was

posted under an earlier settlement. The General Counsel contends the extended posting period is needed to "differentiate the prior Notice posting with the Notice posting in the instant matter, such that the Notice related to the instant matter is posted for a longer period." This post-hoc rationalization ignores that well over *five years* have passed since the prior notice was posted; this lengthy passage of time certainly serves to "differentiate" the prior notice from the present one.

The General Counsel's arguments regarding the portion of the Board's Order expressly requiring Respondent to allow a Union agent to be present for the reading of the notice likewise fail to explain how this remedy is tailored to address the effects of the unfair labor practices at issue. The General Counsel does not dispute that access rights are a disfavored remedy. The General Counsel also does not dispute that this extraordinary remedy was added by the Board with no discussion or justification. And, the General Counsel has not articulated any viable justification in its Response. According to the General Counsel, the Board's Order does not provide "access rights" to the Union, but merely requires that a Union representative be "present" during such meetings. This is a distinction without a difference. A Union agent cannot attend one or more meetings on Respondent's property with Respondent's employees without Respondent giving the Union access since the Union does not represent these employees. Thus, the General Counsel's arguments are misplaced.

The Board's expanded remedies present extraordinary circumstances that warrant reconsideration.

Third, the General Counsel's arguments regarding the two additional bases for reconsideration set forth in Respondent's Motion also fail. In response to Respondent's argument that the Board's departure from longstanding principles and standards and the potential consequences thereof provide bases for reconsideration of its findings that various investigative

interviews were unlawful under Section 8(a)(1), the General Counsel does little more than compliment the Board's Decision and thus does not articulate why Respondent's request for reconsideration should be denied. Likewise, the General Counsel fails to rebut Respondent's arguments concerning the Board's misstatements about record evidence and its reliance on the same in reaching findings that the ESS Employee Council was unlawful.

In short, the General Counsel's Response has not raised compelling reasons to deny Respondent's Motion for Full-Board Reconsideration and the Board's Decision should therefore be reconsidered. Respondent respectfully reiterates its request that the Board reconsider the aspects of its Decision and Order identified therein.

Respectfully submitted this 26th day of October, 2018.

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CERTIFICATE OF SERVICE

On October 26, 2018, a copy of **UPMC Presbyterian Shadyside's Reply to Counsel for the General Counsel's Response in Opposition to Respondent's Motion for Full-Board Reconsideration** has been served by First Class Mail on the following:

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